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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA

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11 DONN VICKREY,
12 Petitioner,
13 v.
14 UNITED STATES OF AMERICA,
15 Respondent.

Case No.: 3:18-cv-01792-BTM

**ORDER DENYING SECOND
AMENDED PETITION TO QUASH
FORMAL DOCUMENT REQUEST
AND GRANTING COUNTER-
PETITION TO ENFORCE FORMAL
DOCUMENT REQUEST**

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17 Before the Court is Petitioner Donn W. Vickrey's second amended petition
18 to quash a Formal Document Request ("FDR") issued by the Internal Revenue
19 Service ("IRS") on May 7, 2018 pursuant to 26 U.S.C. § 982.¹ (ECF No. 23, ¶¶ 1-
20 20; see also ECF No. 15-5 (the FDR).) The FDR was issued after Petitioner
21 purportedly failed to produce documents in response to portions of informational
22 document requests sent to Petitioner and his wife, Kim L. Vickrey, in connection

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25 ¹ Petitioner has also moved for injunctive and other relief in connection with the
26 IRS's alleged failure to timely produce documents that were the subject of a
27 request for access under the Freedom of Information Act, 5 U.S.C. § 552, made
28 by Petitioner on June 27, 2018. (ECF No. 23, ¶¶ 1-8, 21-38; see also ECF No. 23-
1, at 21-52.) The Court previously granted the parties' joint motion to sever this
FOIA-related cause of action from his petition to quash the FDR. (ECF No. 21;
see also ECF Nos. 12, 13.)

1 with the IRS's examination of: (i) the Vickrey's federal income tax liabilities for the
2 2014 through 2016 tax years, including whether they properly declared their
3 interests in or authority over specified foreign financial assets as required by 26
4 U.S.C. § 6038D & 26 C.F.R. § 1.6038D-2; and (ii) Petitioner's compliance with the
5 Report of Foreign Bank and Financial Accounts ("FBAR") filing requirements of 31
6 U.S.C. § 5314 & 31 C.F.R § 1010.350 for the 2012 through 2016 calendar years,
7 including the extent to which Petitioner may be liable for civil penalties under 31
8 U.S.C. § 5321(a)(5) for failure to timely report his interests in, or authority over,
9 foreign financial accounts.² (ECF No. 15-1, ¶¶ 3, 5-18; see *also* ECF Nos. 15-2,
10 15-3, 15-4.)

11 Petitioner timely initiated the instant action seeking to quash the FDR (ECF
12 No. 1),³ arguing that he "did not have foreign accounts during any of the years
13 under audit," (ECF No. 19-1, at 2), that he has previously produced documents
14 responsive to the FDR (see *id.* at 1; ECF No. 19-2), and that the FDR is overbroad
15 because it seeks documents created prior to January 1, 2012 and after December
16 31, 2016 (see ECF No. 15-5, at 8-11), which Petitioner argues are irrelevant to the
17 IRS's examinations of his and/or his wife's income tax and FBAR compliance in
18 2012 through 2016. (ECF Nos. 1, 19, 23; see *also* ECF No. 19-1, at 1 ("After
19 Respondent's examination commenced I produced the documents within my
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22 ² Shortly before the entry of this Order, the parties informed the Court that the IRS
23 has expanded its examination and "is presently examining [the Vickreys'] federal
24 income tax returns for the tax years 2006 through 2016." (ECF No. 33, at 1.)
25 Because the Court concludes that the United States has carried its burden
26 regardless of this expansion of the years under examination by the IRS, the Court
27 does not consider this expansion of years under examination in its analysis.

28 ³ See 26 U.S.C. § 962(c)(2)(A) ("Notwithstanding any other law or rule of law, any
person to whom a formal document request is mailed shall have the right to begin
a proceeding to quash such request not later than the 90th day after the day such
request was mailed.").

1 possession to my legal counsel.”.) As part of its response to the petition to quash,
2 the United States counter-petitions the Court to enter an order compelling
3 Petitioner to produce “all existing foreign-based documentation that are responsive
4 to compliance with Requests Nos. 4, 5, 6, 7, 8, 9, 10, and 11” of the FDR, “as
5 limited to foreign accounts or entities, where the documents originate outside the
6 United States.”⁴ (ECF No. 15, at 5; ECF No. 20, at 3.) In support of its counter-
7 petition, the United States proffers the affidavit of the IRS Revenue Agent assigned
8 to conduct the IRS’s examination of the Vickreys. (ECF No. 15-1.)

9 As an initial matter, the Court agrees with the parties that, because Petitioner
10 resides within the Southern District of California (ECF No. 19-1, at 1; ECF No. 23,
11 ¶ 1), this Court has jurisdiction over the instant petition to quash. See 28 U.S.C. §
12 982(c)(2)(B) (“The United States district court for the district in which the person
13 (to whom the formal document request is mailed) resides or is found shall have
14 jurisdiction to hear any proceeding brought under subparagraph (A).”). Further,
15 the Court finds that the FDR satisfies the administrative requirements for
16 enforcement set forth in 26 U.S.C. § 982(c)(1).⁵ (See ECF No. 15-1, ¶¶ 17-18;
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19 ⁴ In seeking to quash the FDR, Petitioner also argues that the FDR inappropriately
20 seeks to compel the production of documents that do not presently exist because
21 “Request No. 2 asks [Petitioner] to complete and execute a Certification of Foreign
22 Accounts and . . . Request No. 8(a) asks [Petitioner] to prepare a list of all transfers
23 of funds since December 1, 2007.” (ECF No. 23, at 3.) In response, the United
24 States asserts that it “does not seek to enforce FDR Request # 2 (which requires
25 [Petitioner] to fill out a form, and not the production of an existing document)” and
26 that, “[t]o the extent FDR Request #8(a) seeks the production of a list, the United
27 States only seeks to enforce this request to the extent such a list already exists,
28 e.g. a financial statement summarizing transactions created by a financial
institution, and does not seek the Court to order [Petitioner] to create such a list.”
(ECF No. 20, at 3 (citing ECF No. 15-1, ¶ 20); see also ECF No. 15, at 15-16.)

⁵ These administrative requirements require that the FDR be sent via “registered
or certified mail to the taxpayer at his last known address and [must] set[] forth—

1 ECF No, 15-5, at 2-3.) Additionally, the Court agrees with the parties that, in
2 addition to satisfying the administrative requirements set forth in 26 U.S.C. §
3 982(c)(1), the United States must demonstrate that the requirements specified by
4 the Supreme Court in *United States v. Powell*, 370 U.S. 48, 57-58 (1964), are
5 satisfied, namely that: (1) the IRS's investigation will be conducted for a legitimate
6 purpose; (2) the FDR seeks information relevant to that purpose; (3) the
7 information sought is not already in the IRS's possession; and (4) the IRS complied
8 with all relevant administrative requirements. (See ECF No. 15, at 10-11; ECF No.
9 19, at 6.)

10 Here, the Court concludes that the United States has carried its burden to
11 demonstrate the requirements of *Powell* are satisfied. First, as previously noted,
12 the United States has demonstrated compliance with all relevant administrative
13 requirements for the issuance of an FDR. Second, the Revenue Agent's proffered
14 basis for the instant investigation, namely "determining . . . the [Vickreys'] correct
15 income tax liabilities for the 2014 through 2016 tax years[] and . . . whether
16 information filing requirements . . . for the 2014 through 2016 taxable years have
17 been met," and whether the Vickreys should be assessed any additional tax
18 obligation or penalties in connection therewith, clearly demonstrates that the IRS's
19 instant investigation of the Vickreys is being conducted for a legitimate purpose.
20 (See ECF No. 15-1, ¶¶ 3, 5-6, 9, 21, 28.) Third, the Revenue Agent attests that
21 "[t]he IRS is not in the possession of the requested foreign-based documents to
22 FDR Requests # 4, 5, 6, 7, 8, 9, 10, [or] 11," and that, [t]o the extent the IRS may
23 possess some information, for instance, through transcripts of FBARs filed, the
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26 (A) the time and place for the production of the documentation, (B) a statement of
27 the reason the documentation previously produced (if any) is not sufficient, (C) a
28 description of the documentation being sought, and (D) the consequences to the
taxpayer of the failure to produce the documentation described in subparagraph
(C)." 28 U.S.C. § 982(c)(1).

1 IRS does not possess (and has not obtained) the specific records sought in the
2 FDR from [Petitioner] . . . to confirm the accuracy of any information that the IRS
3 may already possess.” (ECF No. 15-1, ¶¶ 31-34.) While Petitioner’s counsel
4 appears to attest that he has previously produced responsive documents to the
5 IRS, (see ECF No. 19-2, at 1-2), the documents he attaches in support of such
6 attestation, as pointed out by the United States, “only refer to the production of
7 documents relating to domestic accounts, and not documents originating from
8 outside the United States,” i.e., foreign-based documentation, (ECF No. 20, at 5).
9 (See ECF No. 19-2, at 4-11.)

10 Finally, the Revenue Agent has sufficiently delineated how the information
11 sought by the FDR, as limited by the Government in its counter-petition, is relevant
12 to the IRS’s legitimate investigatory purposes. (See *id.* ¶¶ 5, 8, 20-29, 33.)
13 Specifically, the Revenue Agent attests that “the FDR seeks to ensure complete
14 records relating to foreign assets are provided to aid in determining the [Vickreys’]
15 correct tax liability for the 2014 through 2016 tax years, and whether there have
16 been any violations relating to FBAR filing requirements (2012 through 2016
17 calendar years) or other information return filing requirements (*i.e.*, IRS Form
18 8938) for the years under examination,” (*id.* ¶ 29), all of which are directly relevant
19 to the IRS’s investigation of the Vickreys. See *United States v. Goldman*, 637 F.2d
20 664, 667 (9th Cir. 1980) (“[T]he required standard that the IRS must meet [to
21 demonstrate relevance] is clearly less than probable cause. The standard has
22 been defined . . . as whether the inspection sought might have thrown light on the
23 correctness of the taxpayer’s return.”); see also *La Mura v. United States*, 765 F.2d
24 974, 981 (11th Cir. 1985) (“The government’s burden of showing relevance in this
25 context is slight. If the information sought by an IRS summons ‘might throw light
26 upon the correctness of the taxpayer’s return,’ then it is deemed to be relevant.”
27 (quoting *United States v. Wyatt*, 637 F.2d 293, 300 (5th Cir. 1981))). For example,
28 the Revenue Agent attests that the IRS is in possession of information reflecting

1 that Petitioner had a financial interest in, or signatory authority over, at least one
2 foreign financial account in calendar years 2008, 2009, 2010, and 2015, but did
3 not file FBAR forms for the calendar years 2011 through 2014 or 2016. (*Id.* ¶¶ 22-
4 24.) Accordingly, the Revenue Agent attests that “details regarding [Petitioner’s]
5 foreign assets, and any income generated by those assets, may be relevant to the
6 income tax examination of the 2014 through 2016 taxable years.” (*Id.* ¶ 26.)
7 Further, the Revenue Agent further attests that the documents sought by the FDR
8 “may reflect the dates when specific securities . . . were acquired, which is
9 important to verify the basis of assets acquired in prior years that may have been
10 sold during the tax years under examination” or “demonstrat[e] transfers to, or
11 from, additional foreign financial accounts, and may reveal additional sources of
12 foreign income that may not have been reported on [the] Vickrey[s]’ income tax
13 returns.” (*Id.* ¶ 27.) Additionally, the documents sought “may be relevant to
14 determining whether an extended assessment statute of limitation for any of [the
15 Vickreys]’ income tax years currently under examination applies” under 26 U.S.C.
16 § 6501, such as “the six-year statute of limitation on assessment set forth in 26
17 U.S.C. § 6501(e)(1) (substantial omission of items) or any of the open-ended
18 statute of limitations, such as 26 U.S.C § 6501(c)(1) (false or fraudulent returns) or
19 26 U.S.C. § 6501(c)(2) (willful attempt to evade or defeat tax).” (*Id.* ¶¶ 5, 28.)
20 Further, the documents sought “may be relevant in determining whether
21 [Petitioner] has willfully violated 31 U.S.C. § 5314 for the years 2012 through
22 2016,” which itself is relevant to the extent of the maximum penalty that may be
23 imposed under 31 U.S.C. § 5321 for failure to timely report a financial interest in,
24 or signatory authority over, a financial account. (*Id.* ¶¶ 8, 25.) Finally, the Revenue
25 Agent attests that the documents sought “may also be relevant in determining
26 whether additional income tax years should be opened for examination.” (*Id.* ¶
27 29.)

28 While Petitioner argues that the Revenue Agent’s explanation of the

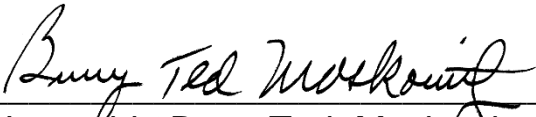
1 relevancy of the documents sought is insufficiently specific to carry the United
2 States' burden to demonstrate relevancy, the case relied upon by Petitioner for
3 such argument, *United States v. Goldman*, 637 F.2d 664 (9th Cir. 1980), is
4 distinguishable. Unlike in *Goldman*, where the affidavit in support of enforcement
5 of an IRS summons made "no reference to any transaction which might possibly
6 afford a realistic expectation necessary to obtain" documents concerning tax years
7 that were not under examination, *id.* at 667, here the Revenue Agent has identified
8 gaps in Petitioner's reporting of foreign financial assets that could cause the IRS
9 to reasonably question whether Petitioner has fully disclosed his foreign financial
10 assets for the years that are under examination. See *Goldman*, 637 F.2d at 667
11 ("The question . . . is whether from what the Government already knows there
12 exists the requisite nexus between taxpayer and records of another's affairs to
13 make the investigation reasonable- in short, whether the 'might' in the articulated
14 standard 'might throw light upon the correctness of the return,' is in the particular
15 circumstances an indication of a realistic expectation rather than an idle hope that
16 something may be discovered." (quoting *United States v. Harrington*, 388 F.2d
17 520, 524 (2d Cir. 1969)); see also *Crystal v. United States*, 172 F.3d 1141, 1144
18 (9th Cir. 1999) ("The government's burden is a slight one, and may be satisfied by
19 a declaration from the investigating agent that the *Powell* requirements have been
20 met. The burden is minimal because the statute must be read broadly in order to
21 ensure that the enforcement powers of the IRS are not unduly restricted." (internal
22 quotations and citations omitted)). Further, Petitioner provides no precedent in
23 support of his assertion that "it is not proper for [the IRS] to circumvent its case
24 opening procedures by seeking enforcement of the FDR in connection with years
25 not under examination." (ECF No. 19, at 9-10.)

26 Based upon the foregoing, the Court concludes that the United States has
27 demonstrated all relevant *Powell* factors are satisfied and that Petitioner has failed
28 to rebut that showing or otherwise demonstrate that enforcement of the FDR would

1 be improper. Accordingly, Petitioner's second amended petition to quash the FDR
2 (ECF No. 23, ¶¶ 1-20) is **DENIED** and the United States' counter-petition to enforce
3 the FDR (ECF No. 19, at 5) is **GRANTED**. Petitioner is hereby ordered to produce
4 to the IRS Revenue Agent assigned to this matter all existing documents that are
5 responsive to Requests Nos. 4 through 11 of the FDR **on or before October 2,**
6 **2020**. The Court determines there is no just reason for delay and directs the Clerk,
7 pursuant to Federal Rule of Civil Procedure 54(b), to immediately enter final
8 judgment denying Petitioner's second amended petition to quash the FDR and
9 granting the United States' counter-petition to enforce the FDR.

10 **IT IS SO ORDERED.**

11 Dated: September 4, 2020

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14 Honorable Barry Ted. Moskowitz
15 United States District Judge
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